

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

75-7532

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

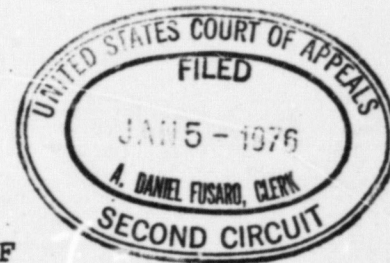
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P/S

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IN THE MATTER OF

AIRSPUR CORPORATION, a/k/a
AIRSPUR, NEW YORK, Bankrupt.

Docket No. 75-7532

-----x



APPELLANT'S REPLY BRIEF

ALEX L. ROSEN, ESQ.
Attorney for Appellant
225 Broadway
New York, New York 10007
212-227-1787

Of Counsel
Alex L. Rosen
Allan Feingertz

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PREFACE

It is not the intention of the Appellant to burden the Court with a restatement of issues and arguments previously discussed in Appellant's Brief. However, a short statement of Appellant's position regarding the principal issue before the Court will be helpful in its analysis of the arguments and law presented. In short, it is Appellant's contention that the assumption of control of the bankrupt by all the Appellees and their purchase of fifty per cent of the bankrupt's common stock were conditioned upon the extension of credit to the bankrupt by the Appellees, and, therefore, one transaction could not have occurred absent the other. Since a logical and factual relationship existed between the notes upon which the Appellees have sought recovery, and the purchase agreement, upon which the Appellant's objections, offsets, and counterclaims are based, jurisdiction lies within the province of the Bankruptcy Court as arising out of the same transaction.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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In the Matter of :
AIRSPUR CORPORATION, a/k/a : Docket No. 75/7532
AIRSPUR NEW YORK, :
Bankrupt. :
-----X

APPELLANT'S REPLY BRIEF

1. In Response to Ohio Real Property, Inc.

The Trustee's position with respect to the argument of Ohio has a two-fold premise:

(a) That the purported assignments by Ohio of its Airspur stock and promissory note were and are void by virtue of the failure of Ohio to comply with the express provisions of those instruments concerning assignment; and

(b) The entire transaction of purported transfer to a liquidating Trustee was part of a deliberate scheme to protect the shareholders of Ohio against the effects of a successful claim by the Trustee in bankruptcy.

The essential facts are that in May of 1971, Ohio entered into a plan of dissolution and liquidation. Prior thereto, in March of 1971, Ohio, in its individual capacity, filed a Proof of Claim in the pending Airspur bankruptcy (90a)

proceeding. On December 27, 1971, Ohio purportedly executed an assignment of its Airspur stock, together with the Airspur promissory note and Ohio's claims with respect thereto, to its liquidating Trustee, L. J. Rauth, who was also Secretary of the Ohio corporation.

No notice of that assignment was given to the Trustee in bankruptcy, nor did Ohio or the liquidating Trustee then take any action with respect to the previously filed Ohio claim in the bankruptcy proceeding.

Early in the year 1972, the principals of Ohio became aware of the fact that the Trustee intended to file objections to their claim, and also counterclaim, and, apparently in response to this anticipated action, a further document was prepared and executed in March 1972 designated as "CONFIRMATION OF ASSIGNMENT" (96a). Apparently, at this time, Ohio was still a viable corporate entity, since the March 1972 document was executed by both its Vice President and Secretary and referred to the earlier assignment of December 27, 1971.

Based on this second document, the liquidating Trustee made application to the Bankruptcy Court to be subrogated to the claim of Ohio, which application, not on

notice to the Trustee in bankruptcy, was granted by the Court pursuant to Order of April 21, 1972. The bankruptcy Trustee's objections were filed on September 6, 1972. (95a)

By virtue of this sequence of events, Ohio now claims that the Bankruptcy Court does not have in personam jurisdiction over it.

The bankruptcy Trustee contends that pursuant to the provisions of the instruments which were purportedly assigned, certain pre-conditions had to be met in order for those assignments to be valid and effective as against the company and a fortiori, against the bankruptcy Trustee.

On the face of the Note (p. 92a) assigned to the liquidating Trustee, appears a legend stating that:

"The sale or transfer of this Note is subject to the provisions of the Federal Securities Act of 1933, as amended, and to the terms of a Purchase Agreement dated as of July 24, 1969 among Airspur Corporation and certain Purchasers identified therein."

The Purchase Agreement referred to, dated as of July 24, 1969 (p. 5a) contains the following sections relative to the transfer or assignment of the Note and/or any shares of Stock of Airspur Corp.

At p. 20a-21a:

"SECTION 8.01. Each of the Purchasers prior to making any disposition of its Note and/or any shares of its Stock, will give prior written notice to the Company describing briefly the manner in which any proposed disposition is to be made. The Company will, upon receipt of any such notice, use its best efforts, in consultation with counsel for such Purchaser, to ascertain as promptly as possible whether or not registration under the Securities Act of 1933, as amended (the "1933 Act") (or perfection of an exemption) is required and will advise such Purchaser promptly in writing with respect thereto.

"SECTION 3.02. Each of the Purchasers represents to the Company that the Note and the shares of Stock being purchased by it are being acquired for investment and not for the purpose of or with a view to the distribution or resale thereof, and agrees that it will not sell or otherwise transfer such Note or any of such shares unless (a) in the case of the Stock, pursuant to an effective registration statement under the 1933 Act, or (b) in the case of the Stock and the Notes, there has been delivered to the Company an opinion of Messrs. Reavis, Pogue, Neal & Rose or other counsel acceptable to the Company, which opinion shall be in form and substance reasonably satisfactory to the Company, to the effect that such sale or other transfer may be effected pursuant to an exemption or in compliance with the 1933 Act and other applicable federal requirements (which opinion may be conditioned upon a representation by the proposed transferee that he or it is acquiring the Note or the shares of Stock for his or its account for investment and not with a view to, or for sale in connection with, any distribution thereof, and that he or it has no present intention of distributing or reselling such Note or any of such Stock."

At p. 38a:

"SECTION 9.07. No modification or waiver of any provision of this Purchase Agreement or of the Notes nor consent to any departure by the Company therefrom shall in any event be effective unless the same shall be in writing, and then such waiver of consent shall be effective only in the specific instance and for the purpose for which given. No notice to or demand on the Company in any case shall entitle the Company to any other or further notice or demand in the same circumstances."

The body of the Note itself bears the following conditions: (92a)

"This note is not transferable by endorsement or otherwise than by surrender hereof for cancellation and the issue of a new note of like tenor in the name of the transferee and the registration of the transfer upon the books kept by the Corp...." (emphasis supplied.)

It is evident beyond any shadow of doubt that the alleged assignment to Rauth of Ohio's Note did not conform with the requirements as promulgated in the controlling sections as specifically set forth in the Note, the Purchase Agreement, and incorporated into the March 24, 1972 "Confirmation of Assignment"/^(96a) issued to Rauth by Ohio and filed with the Bankruptcy Court to effect the subrogation to Rauth. This failure to comply with these mandatory provisions render the alleged assignment and subrogation of

the Note and Claim to Rauth null and void ab initio, vitiating the subrogation order of April 21, 1972 as a matter of fact, restoring Ohio to its original status as Claimant, abrogating its contention that the court lacks in personam jurisdiction, and thereby subjecting it to the objections and counterclaims filed by the Trustee.

In the event that this Court determines that a valid assignment has occurred, it must be assumed that the beneficiaries of the liquidating trust are the very shareholders of Ohio who now seek to shield themselves from the effects of the Trustee's counterclaim by virtue of the purported assignment to their Trustee. Nevertheless, they must acknowledge that to the extent that the claim of Ohio has a value as against the bankruptcy Trustee, the benefits thereof will flow to the Ohio shareholders. As a matter of equity, particularly in a court of equity, it would seem destructive to the intent of the Bankruptcy Act to permit this transaction which in form creates separate parties to cloud the fact that in substance the liquidating Trustee is, in fact, Ohio.

2. In Response to Bankers' Trust Co.

Preliminary Statement Regarding
the Issues and Arguments Raised
in Bankers' Supplemental Brief

Appellee Bankers Trust Co., in its supplemental brief, has once again raised an issue it previously raised, without any success, in the Bankruptcy Court. That issue concerns Bankers' status as a Trustee and the right of the Appellant to claim against the trust estate for actions of Bankers as Trustee. Appellant has stated in its brief to this Court (p. 26-27) its reasons for not previously addressing this alleged issue. However, in light of Appellee Bankers' discussion in its supplemental brief, Appellant is compelled to present a response so that silence might not be interpreted as acceptance of Appellee Bankers' contentions.

Should It Be Determined That Issues Not Raised Below, Or Raised But Not Appealed From Are Properly Before This Court, Appellee "Bankers" Is Properly Subject To the Objections And Counterclaims By The Trustee In Bankruptcy Which Arise Under The Same Agreement From Which Bankers' Claim Derives

Appellant Bankers, appearing in its representative capacity as Trustee of certain trusts, asserts that, irrespective of whatever breaches it might have committed under the very agreement from which its claim derives, the claim must be allowed without objection. It urges that the Trustee is powerless to object to its claim, or to assert a counterclaim, and that whatever remedy he has must be in another forum.

Aside from being contrary to reason, Bankers' position finds no support in law.

A. Filing of Claim as Consent

The short answer to Bankers' argument is that the trust estate, like any other claimant in bankruptcy, consents, when involving the jurisdiction of the Court, to the Court's entertainment of objections to the claim and counterclaims arising from the same subject matter. (See discussion and authorities in Appellant's Brief.)

It has long been the law that a Trustee, by contractual undertaking, can consent that the property of the trust estate be subject to claims of third persons. Gisborn v. The Charter Oak Life Ins. Co., 142 U.S. 326 (1892); Jessup v. Smith, 223 N.Y. 203 (1918). Neither policy nor reason inhibits the Trustee from manifesting like consent by the act of appearing as a claimant in the Bankruptcy Court. Surely, the orderly judicial process compels the implication of such consent.

B. State Law Permits Proceeding Directly Against the Trust Estate

Assuming, arguendo, that State law is relevant in the present context, Bankers fairs no better. Bankers' reliance upon New York law is misfounded. First, as we shall show below, even if New York law were applicable, its motion would have to be denied. Second, if State law is applicable, by the express terms of the Purchase Agreement and Shareholders' Agreement, Delaware, not New York, law governs the Trustee's right to proceed directly against the trust estate. (Shareholders' Agreement, Section II, Purchase Agreement, Section 9.06).

Research has disclosed no Delaware authority dispositive of the matter. However, the overwhelming weight of modern authority supports the right of a third person to look to the trust estate to obtain satisfaction of a claim, even where the trust has not assumed a plaintiff's role as Bankers has in the instant proceeding.

Thus, the Restatement of Trusts states:

"a. The Modern Trend. It has gradually become established that a person to whom the trustee has incurred liability in the course of the administration of the trust may reach the trust estate for the satisfaction of his claim..." Restatement, Trusts 2d §271A., comment a.

A like approach has been adopted by the Uniform Trusts Act both as regards the Trustee's contracts and his torts. U.T.A. §§12, 14. Accord, III Scott Trusts, §§271 A 1, 271 A 2 (2d Ed. 1967); Williston Contracts §312 A (3rd Ed. 1959). Significantly, this modern trend has already been joined by Alabama, California, Connecticut, Georgia, Montana, North Dakota, Pennsylvania, Rhode Island, South Dakota and Texas. (See Williston, Contract supra).

As observed by Professor Scott:

"[C]ourts have gradually come to recognize the justice of permitting a third person to whom the trustee has incurred a liability in the administration of the trust to obtain satisfaction of his claim out of the trust estate." III Scott Trusts, supra, §271 A.

The continued existence in some jurisdictions of the remnants of the old common law rule that a third person may only sue a trustee in his individual capacity exemplifies a legal anachronism. The rule first arose due to the procedural difficulty, in an action of law, of recognizing anybody but the trustee as a legal entity capable of being sued. While the merger of law and equity has eliminated this problem, and the old rule has lost the sole justification for its existence as with many other archaic elements of the common law, it expires slowly.

3 Bogert Trusts and Trustees §712 (2d Ed. 1961).

It is thus inconceivable that Delaware, free of binding precedent, in a matter of first impression, would shackle itself with an obsolete rule rather than opting for the modern trend.

It is respectfully submitted that this Court should attribute to Delaware, the adoption of contemporary standards, if it deems it necessary to apply State law.

Indeed, even if New York law were applicable here, Bankers' motion would have to be denied. It has been the law of New York for almost a century that where a trust instrument, fairly construed, permits the Trustee to use the general credit of the trust in entering into business ventures, a suit may be maintained in equity directly against the trust. Willis v. Sharp, 113 N.Y. 586 (1889). This right is not dependent on any power the Trustee may or may not have under the terms of the trust. It is sufficient that the Trustee was authorized by the terms of the trust to incur such an obligation as that in question. The equity of the creditor arises by operation of law, either by virtue of a right of subrogation to have applied to the payment of the claim the Trustee's right against the trust estate as an asset of the Trustee or by virtue of a broader and less exactly defined equity, that the transaction having been entered upon for the benefit of the trust estate, the estate should be answerable. Jessup v. Smith, supra. Significantly, Bankers has not offered the

relevant trust agreements in support of its motion.

Thus, at minimum, were New York law applicable, before ruling on Bankers' motion, the Court would be compelled to hold a hearing at which the trust instruments would be produced for examination.

C. Summary

In sum, the movant trust estate, by filing its claim with this Court, effected an appearance [cf. In Re Nortex Trading Corp., 311 F.2d 162 (2d Cir. 1962)], and must abide by the consequences thereof. One consequence is the right of the trustee to make objections and to assert counterclaims deriving from the same "subject matter" as the claim.

This approach, it should be noted, is in harmony with Rule 13, Fed.R.Civ.Proc., which deals with counterclaims. As Professor Moore has noted:

"[M]ore recent cases indicate the court should not interpret 'opposing party' mechanically but should interpret it liberally and realistically so as to allow the joinder of all related claims and prevent multiplicity of suits." 3 Moore, Fed. Practice §13.06[1] (2d Ed.) p. 130.

The only realistic approach, consonant with reason and justice in the instant situation, whether one follows federal law, or looks to State law, is to sustain the Trustee's right to assert the counterclaim. To do otherwise would result in fragmentation of the issues, a needless waste of the assets of the bankrupt and a waste of the Court's time.

Dated: New York, New York
December 30, 1975

Respectfully submitted,

ALEX L. ROSEN, ESQ.
Attorney for Appellant
Jerome Lipper as Trustee
in Bankruptcy for Airspur
Corporation, Bankrupt

Alex L. Rosen
Allan Feingertz
Of Counsel

STATE OF NEW YORK)

SS:

COUNTY OF NEW YORK)

Joan Poulsen being duly sworn,
deposes and says:

That deponent is not a party to the action; is over 18
years of age and resides at Brooklyn, New York.

That on the 31st day of December, 1975,
deponent served the within Appellant's Reply Brief (2 copies each)
upon the following at their respective addresses by depositing same
enclosed in a postpaid properly addressed wrapper, in an official
depository under the exclusive care and custody of the United States
Post Office within the State of New York:

Cowan Liebowitz & Latman, P.C.
200 East 42nd Street
New York, New York 10017

White & Case, Esqs.
14 Wall Street
New York, New York
Peter M. Collins, Esq.

Carter, Ledyard & Milburn, Esqs.
Two Wall Street
New York, New York 10005

Bigham, Englar, Jones & Houston, Esqs.
99 John Street
New York, New York
John MacCrate, III, Esq.

Lovejoy, Wasson, Lundgren & Ashtown, Esqs.
250 Park Avenue
New York, New York
Daniel Sullivan, Esq.

Sworn to before me this

31 day of December, 1975

Joan Poulsen
JOAN POULSEN

Jonathan H. Needle
JONATHAN H. NEEDLE
NOTARY PUBLIC, STATE OF NEW YORK
No. 31-8108908
Qualified in New York County
Commission Expires March 30, 1976

